No. 11080

In the United States Circuit Court of Appeals for the Ninth Circuit

JOHN E. GALLOIS, EXECUTOR, AND JEANNE G. HILL, EXECUTRIX OF THE ESTATE OF MARGARET P. GALLOIS, DECEASED, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

ON PETITION FOR REVIEW OF THE DECISION OF THE TAX COURT OF THE UNITED STATES

BRIEF FOR THE RESPONDENT

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CITATIONS

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v.

Commissioner of Internal Revenue, respondent

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OPINION BELOW

The opinion of the Tax Court (R. 89–101) is reported at 4 T. C. 840.

JURISDICTION

The Commissioner of Internal Revenue determined a deficiency in estate tax against the estate of Margaret P. Gallois on August 31, 1943. (R. 10–11.) On November 26, 1943, which was within the 90-day period allowed by the revenue statute, the proper representatives of the estate filed a petition for rede-

termination of such deficiency by the Tax Court (R. 3–9) under the authority of Section 871 of the Internal Revenue Code and its decision determining a deficiency in the amount of $19,323.36 was filed February 27, 1945 (R. 101). Thereafter, and within the 90 days allowed by statute, the petition for review was filed on behalf of the estate in this Court on May 24, 1945 (R. 102–110), pursuant to Sections 1141–1142 of the Internal Revenue Code.

QUESTION PRESENTED

In the trust instrument drawn by the decedent it was provided that the corpus of the trust could be invaded when necessary for her maintenance and she was also to receive the trust income during her life; but it is contended by the taxpayers that the provision relative to invasion of the corpus was abandoned by an oral agreement between decedent and her son, and that the consideration for such agreement was payment by the son of a debt which he owed her but the collection of which was then barred by the statute of limitations.

The question is whether the general provisions of Section 811 (c) of the Internal Revenue Code require the inclusion in gross estate of the value of the trust corpus at date of death, as the Tax Court held; or whether such value may be excluded under an exception in that section allowing exclusion in case of an interest acquired in a bona fide sale for adequate and full consideration in money or money's worth.

STATUTE INVOLVED

Internal Revenue Code:

SEC. 811. GROSS ESTATE.

The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside of the United States—

*   *   *   *   *

(c) *Transfers in Contemplation of, or Taking Effect at Death.*—To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, or of which he has at any time made a transfer, by trust or otherwise, under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death (1) the possession or enjoyment of, or the right to the income from, the property, or (2) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom; except in case of a bona fide sale for an adequate and full consideration in money or money's worth. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such consideration, shall, unless shown to the contrary, be deemed to have

been made in contemplation of death within the meaning of this subchapter;

*   *   *   *   *

(26 U. S. C. 1940 ed., Sec. 811.)

STATEMENT

The facts as found by the Tax Court are as follows:

The decedent, Margaret P. Gallois, died testate on August 8, 1940, a resident of San Francisco, California. The taxpayers, John E. Gallois and Jeanne G. Hill, are executor and executrix, respectively, of her last will and testament. The estate tax return was filed with the Collector of Internal Revenue for the First District of California. (R. 90.)

Prior to August, 1924, the decedent had loaned to her son, John E. Gallois, the sum of $251,000 with no evidence of the indebtedness being executed in writing. In order to make this loan she had heavily encumbered her own property. Because she had advanced to her son such a large part of his portion of the estate, the decedent desired to protect the interest of her other child, Jeanne G. Hill, and so, on August 9, 1924, executed a trust. (R. 90.)

The trustees were directed to apply the income of the trust, (a) to the payment of interest due or to become due on the obligations of the decedent, secured by liens on the trust property; (b) to the payment of taxes, assessments, insurance, repairs, etc.; and (c) after payment of the above charges, to pay the remainder of the net income to the decedent. (R. 90.)

Other material provisions of the trust are as follows: (R. 91–93):

> Second: The Trustees are likewise authorized and directed to apply to the maintenance and support of said Margaret P. Gallois any portion of the principal of said trust fund which may at any time be in their opinion necessary for her maintenance and support by reason of or in the event of any deficiency in the income of said trust fund.
>
> Third: Upon the death of said Margaret P. Gallois the said trust and the powers and duties of the surviving Trustees shall continue during the life of Jeanne G. Hill, and during her life the net income from said property, as hereinbefore defined, shall be paid by said surviving Trustees to said Jeanne G. Hill.
>
> * * * * *
>
> Fifth: Upon the death of said Jeanne G. Hill the said trust shall cease and determine and all of said trust property then remaining in the hands of said surviving Trustees shall go to and vest absolutely in equal shares in the children of said Jeanne G. Hill. If, at the time of the death of said Jeanne G. Hill, any of her children shall have died leaving issue, such issue shall receive the share of said trust property to which such deceased child would have been entitled if living. If all of the children of said Jeanne G. Hill should predecease her, then upon her death said trust fund and the whole thereof shall go to and vest in John Gallois, if living, and if he be then dead, then it shall vest in the next of kin of said Jeanne G. Hill, in accordance with the succession laws of

the State of California then in effect. In the event of the death of said Jeanne G. Hill prior to the death of said Margaret P. Gallois, said trust shall cease and determine upon the death of said Margaret P. Gallois, and said trust fund and the whole thereof shall go to and vest in the children of Jeanne G. Hill and their issue, as hereinbefore provided. If said Jeanne G. Hill and all her children die without issue prior to the death of said Margaret P. Gallois, then this trust shall terminate and the trust funds shall vest in said Margaret P. Gallois.

* * * * *

Ninth: Whereas said Margaret P. Gallois heretofore laid out and expended for the account and benefit of John Gallois the sum of $251,000, or thereabouts, exclusive of interest, and this agreement is made in part for the purpose of insuring to Jeanne G. Hill and her children a benefit which may to some extent correct the discrepancy between the moneys received by said Jeanne G. Hill from said Margaret P. Gallois and the outlays of said Margaret P. Gallois on behalf of said John Gallois.

Now, therefore, notwithstanding anything which may be hereinbefore contained, it is provided that at the time of the death of said Margaret P. Gallois, if there has been paid to her by John Gallois or on his account sums of money sufficient so that the said Margaret P. Gallois shall have been reimbursed to such extent that the amount unpaid is less than the value of the assets in the annexed schedule, exclusive of any claim against John Gallois, as appraised at the time of her death, then fifty

(50%) percent of the excess of the value of said property over and above the amount of such outlays remaining unpaid shall go to and vest in said John Gallois and the balance of said property shall vest as hereinbefore provided. If, at the time of the death of said Margaret P. Gallois, the amount of such unpaid outlays made by her on behalf of John Gallois still exceeds the then value of the trust fund in the hands of said Trustees, exclusive of any claim against John Gallois, the whole of said fund shall go to and vest in the children of Jeanne G. Hill, after her death as hereinbefore provided, but said John Gallois shall not at any time be deemed indebted to said Trustee or to the estate of Margaret P. Gallois, nor shall any attempt be made by the Trustees or any successors of Margaret P. Gallois to collect any part of said outlays from said John Gallois, and if the same shall at the death of Margaret P. Gallois apparently exist as an indebtedness, such indebtedness shall be deemed forgiven and cancelled, together with any instruments, documents or writings of any kind constituting evidence of any such indebtedness, so that the same cannot go to or vest in any successor of Margaret P. Gallois under the terms of this instrument or otherwise.

The decedent retained no power to alter, amend or revoke the trust. (R. 93.)

At the time the trust was created, the decedent was 68 years of age and in good health for a woman of that age. She had two children, three grandchildren and three great grandchildren, all of whom survived her. (R. 93–94.)

The decedent's son was unaware of the trust at the time of its creation and did not learn of its existence until about two years later. (R. 94.)

The husband of the decedent's daughter had been well off, but in the period from 1924 to 1928 he was in very straitened circumstances. It was to protect her daughter from further loss that the decedent had created the trust. The trust had an indebtedness greater than the market value of the property in the trust and decedent's son was constantly being pressed by her son-in-law and others to pay the amount he owed her. The former was unable to make any payments on his indebtedness until 1927, but between December 19, 1927, and September 13, 1928, he made payments aggregating about $42,000. (R. 94.)

By October, 1928, decedent's son was financially able to pay the balance of the money he had borrowed from his mother. At that time he and the decedent agreed orally that he would pay back the sums he had borrowed upon condition that he was made a trustee and that the corpus of the trust would not be invaded again. She agreed to these conditions and her son then executed his promissory note, dated October 30, 1928, in the sum of $251,000, to the trustees. (R. 94.)

Following this, and on November 7, 1928, two of the original trustees resigned, and decedent's son and daughter were appointed trustees in their place. Following his appointment as trustee, decedent's son paid the balance of his indebtedness. (R. 94–95.)

On June 19, 1942, the Superior Court of California, for the City and County of San Francisco, entered a

"Decree Terminating Life Estate, etc." in which it was adjudged that (R. 95)—

> upon and by reason of the death of said Margaret P. Gallois, an undivided one-half interest in the real and personal property hereinabove mentioned and described as constituting the property of said trust estate, vested in said John Gallois personally, and the interest of said trust and the Trustees thereof, in said one-half of said trust estate terminated.

The Tax Court held that the entire value of the trust corpus was includible in the gross estate and so found that there is a deficiency in estate tax in the amount of $19,323.36. (R. 101.)

SUMMARY OF ARGUMENT

The Tax Court correctly held that the corpus of the trust created by the decedent should be included in its entirety in her gross estate. Its decision can be sustained on two grounds. The first of these, which was not mentioned by the Tax Court, is the possibility that the trust corpus might revert to the decedent under the terms of the trust. As such provision gave the decedent a contingent interest in the corpus until her death, it was not known until then whether the other interests covered by the trust would actually pass to the beneficiaries named therein. Consequently her death caused a shifting of beneficial interests and makes the entire corpus includible in the gross estate.

The second reason why the Tax Court's decision should be sustained here is that, since the trust agreement gave the trustees the right to invade the corpus

if necessary for the support of the settlor, it could not be known until her death how much, if anything, would be left and so actually the transfers made by the trust could not take effect in possession or enjoyment until her death.

Taxpayers assert that the right to invade the corpus was relinquished by the decedent in an oral agreement with her son whereby he agreed to pay a debt which he owed her. The debt was barred by the statute of limitations but the son agreed to pay if his mother would relinquish her right to trust corpus. It is contended that such oral understanding brings this case within an exception in Section 811 (c) of the Internal Revenue Code which permits exclusion of property from an estate if transferred in connection with a bona fide sale for full and adequate consideration in money or money's worth.

However, it is clear that the alleged consideration does not meet the statutory requirements, and state law, which the taxpayers rely on, cannot be followed in determining what consideration is necessary for federal estate tax purposes.

ARGUMENT

Section 811 (c) of the Internal Revenue Code requires the corpus of the trust here to be included in the gross estate as a transfer intended to take effect in possession or enjoyment at or after death

The only question here is whether the corpus of the trust created by the decedent in 1924 should be included in her gross estate under the provisions of Section 811 (c) of the Internal Revenue Code, *supra*. That section provides, in substance, for the inclusion

of any interest of which the decedent has made a transfer in trust which was intended to take effect in possession or enjoyment at or after her death, or under which she retains an interest in the property or the income therefrom for life or other period which does not end with death, except in case of a bona fide sale for an adequate and full consideration in money or money's worth. The Tax Court decided that this section required the entire trust corpus to be included in the decedent's gross estate on the ground that, since the trust instrument allowed the corpus to be invaded for the benefit of the decedent, as settlor, it could not be determined until her death whether any of the trust would pass to the named remainderman. (R. 98.)

We submit that its decision is correct and is, as we shall show below, in accord with the applicable decisions. There is also another reason why the transfer under the trust was one intended to take effect at decedent's death, namely, that there was a possibility that the corpus would revert to her and it could not be known until her death that it would not do so.[1] This second reason for inclusion of the trust corpus in the gross estate was set forth in the Government's brief

[1] The trust instrument provides in regard to the possibility of reverter that (R. 71)—"In the event of the death of said Jeanne G. Hill prior to the death of said Margaret P. Gallois, said trust shall cease and determine upon the death of said Margaret P. Gallois, and said trust fund and the whole thereof shall go to and vest in the children of Jeanne G. Hill and their issue, as hereinbefore provided. *If said Jeanne G. Hill and her children die without issue prior to the death of said Margaret P. Gallois, then this trust shall terminate and the trust fund shall vest in said Margaret P. Gallois.*" [Italics supplied.]

with the Tax Court but was not mentioned by the Tax Court. However, as this additional ground for the decision here was the basis for three recent decisions of the Supreme Court involving similar transfers in trust, we will discuss these cases first.[2]

A. The possibility of reverter to the decedent prevented the transfers to beneficiaries of remainder interests from taking effect until her death

The trust instrument provides that if decedent's daughter and the latter's children (all beneficiaries of remainder interests) predeceased her, then the trust was to terminate and the trust fund was to vest in the decedent, who was also to get the trust income for life, with certain exceptions not material here. (R. 71.) This possibility of reverter to the decedent requires the trust corpus to be included in the decedent's gross estate. *Fidelity Co.* v. *Rothensies,* 324 U. S. 108; *Commissioner* v. *Estate of Field,* 324 U. S. 113; *Goldstone* v. *United States,* decided by the Su-

[2] The last of these cases was decided by the Supreme Court several months after the Tax Court's decision. The other two were decided shortly before but it may be that the Tax Court was not aware that they had been decided. Thus it may have considered the question there still undecided in all three of the cases and may have hesitated to refer to them because prior thereto two other decisions raised some doubt as to the extent to which possibility of reverter could be relied on as a basis for including trust property in an estate. See *Commissioner* v. *Kellogg*, 119 F. 2d 54 (C. C. A. 3d), and *Lloyd's Estate* v. *Commissioner*, 141 F. 2d 758 (C. C. A. 3d), which cases seemed to indicate that mere possibility of reverter was not sufficient to warrant inclusion. However, the facts in those cases are distinguishable from the facts here. Moreover, those cases must be considered in the light of the subsequent Supreme Court decisions, and if in conflict, can be given effect only to the extent warranted by the later decisions.

preme Court June 11, 1945 (C. C. H. Inheritance Estate and Gift Tax Service, par 10,209). These cases clarify and interpret *Helvering* v. *Hallock,* 309 U. S. 106, in such a way as to indicate clearly that transfers like that in the instant case are taxable under Section 811 (c).[3] Also see *Eldredge* v. *Rothensies,* 150 F. 2d 23 (C. C. A. 3d).

In *Fidelity Co.* v. *Rothensies, supra,* the decedent had created a trust to pay the income to the settlor during her life and at her death to her two daughters during their respective lives. At the death of each daughter the corpus supporting her share of the income was to be paid to her descendants. If both daughters died without leaving surviving descendants, the corpus was to be paid to such persons as the settlor might appoint by will. The Supreme Court, approving the principles set forth in *Klein* v. *United States,* 283 U. S. 231, and *Helvering* v. *Hallock, supra,* held that the full value of the corpus was includible in the grantor's gross estate as a transfer under Section 302 (c) of the Revenue Act of 1926, the provisions of which have been carried forward into Section 811 (c) of the Internal Revenue Code. In so holding the Court said (pp. 111–112):

> It is fruitless to speculate on the probabilities of the property being distributed under the contingent power of appointment. Indeed, such speculation is irrelevant to the measure-

[3] Since the trust in the instant case was created in 1924, we are not here relying upon the specific statutory amendments in 1931 and 1932, relating to the retention of income for life and making such fact by itself sufficient basis for inclusion. Those amendments operate prospectively only. *Hassett* v. *Welch,* 303 U. S. 303.

> ment of estate tax liability. The application of this tax does not depend upon "elusive and subtle casuistries." *Helvering* v. *Hallock, supra,* 118. No more should the measure of the tax depend upon conjectures as to the propinquity or certainty of the decedent's reversionary interests. *It is enough if he retains some contingent interest in the property until his death or thereafter, delaying until then the ripening of full dominion over the property by the beneficiaries.* The value of the property subject to the contingency, rather than the actuarial or theoretical value of the possibility of the occurrence of the contingency, is the measure of the tax. That value is demonstrated by the consequences that would flow in this instance from the decedent's survival of her daughters and any of the latter's surviving descendants. [Italics supplied.]

In the *Field* case, *supra,* the decedent created a trust during his lifetime, reserving the income for life and also the right to get back the corpus if he should survive his two nieces. He did not survive them and it was held that the full value of the trust property was includible in his gross estate under Section 302 (c), *supra.* In so holding, the Court referred to its decision in the *Fidelity* case and also said (p. 16):

> The estate tax is not based on the value of the reversionary interest of the decedent at the time of his death but on the value at the time of his death of the property to which that reversionary interest relates. It makes no difference how vested may be the remainder interests in the corpus or how remote or uncer-

> tain may be the decedent's reversionary interest. *If the corpus does not shed the possibility of reversion until at or after the decedent's death, the value of the entire corpus on the date of death is taxable.* [Italics supplied.]

In the *Goldstone* case, *supra,* the decedent had purchased a single premium life insurance policy and an annuity policy in combination. The death benefits under the life contract and a refund under the annuity contract were payable at the decedent's death to his wife, or, if she predeceased him, to their daughters. If the decedent survived both his wife and daughters, the proceeds were payable to his estate. The incidents of ownership as to each contract could be exercised by the decedent's wife during her lifetime and upon her death such rights were exercisable by the decedent if he survived her. The wife did not exercise her rights of ownership and she outlived the decedent and became the recipient of the proceeds of the policies when he died. The Court held such proceeds includible in the decedent's gross estate under Section 302 (c), *supra.* In so holding the Court took the view that the wife's unused powers, if significant at all, only added to the remoteness of the reversionary interest and did not erase it; and since such interest existed at the time of the decedent's death, delaying until then the determination of the ultimate possession or enjoyment of the property, the transfer was taxable.

With these principles in mind, it is clear that the transfer in the trust here was one to take effect at

death. The decedent not only retained the trust income for life but there was also a possibility that the corpus would revert to her. Thus her death ripened and enlarged the interests of the remaindermen and their rights were conditional upon survivorship in a very real sense. Therefore the possibility of a reverter here is sufficient reason for taxing the trust corpus and should be considered as a ground for sustaining the Tax Court's decision in addition to the one stated in its opinion.

B. The corpus of the trust must be included in the gross estate because the trustees had the right to invade it for the benefit of the decedent

The trust instrument not only gave the decedent the trust income for life, with certain exceptions not material here, but it also authorized the trustees to apply any portion of the principal of the trust fund to the maintenance and support of the decedent at any time that they might consider it necessary. (R. 69–70.) In relying on this provision for its decision, the Tax Court stated (R. 98) that it could not be known, until the decedent's death, whether any of the corpus would pass to the named remaindermen and pointed out that the instant case is substantially the same as *Blunt* v. *Kelly*, 131 F. 2d 632 (C. C. A. 3d). In that case the decedent created a trust providing in part that should, in their opinion, the necessity arise, the trustees were empowered to use such portion of the corpus of the trust fund as might seem proper for the support, care or benefit of the settlor. The decedent was not a trustee but one of the trustees was her son, who was also a remainderman under the trust.

It was contended that, since one of the trustees was a remainderman and so had an interest adverse to that of the settlor with respect to the principal, she thereby effectively terminated her interest therein. But the court said (p. 634):

> It is true that under this provision the trustees, one of whom held an adverse interest, were required to form an opinion as to the existence of any such necessity, but in so doing the trustees were not making a free and uncontrolled decision. They were of course bound to form their opinion on the existence of any such necessity in good faith and were subject to the control of the equity courts if they failed to do so. * * * Under these circumstances, * * * the transfer * * * did not take effect in possession and enjoyment until the death of the settlor since, until then, it might have become necessary under the terms of the trust to apply the principal to her support, care or benefit.

The same conclusion was reached under similar circumstances in *Chase Nat. Bank of City of New York* v. *Higgins,* 38 F. Supp. 858 (S. D. N. Y.). Also cf. *Merchants Bank* v. *Commissioner,* 320 U. S. 256.

There being no substantial difference in the facts here, we submit that the *Blunt* case, *supra,* is applicable here and that the Tax Court has properly interpreted the law. However, the taxpayers, without apparently denying that the trust corpus would be includible under the general provisions of Section 811 (c), assert that it comes within the exception contained therein and should be excluded for that reason.

C. The transaction between the decedent and her son relative to the payment of his debt was not a bona fide sale with the consideration required by Section 811 (c) and so does not come within the exception of that section allowing exclusion of property under the conditions prescribed therein

As we have just indicated, counsel for taxpayers confine their whole argument to a discussion of the exception in Section 811 (c) allowing transfers in trust, which might otherwise be includible in a gross estate, to be excluded if made "in a bona fide sale for an adequate and full consideration in money or money's worth". It is their contention that this case comes within such exception because decedent's son gave consideration which meets the requirements of this statutory provision and so permits exclusion of the entire trust corpus. In making this assertion counsel rely upon the facts (1) that the debt, which John Gallois owed his mother, decedent here, and which was the chief reason for the trust being created, was barred[4] by the statute of limitation by December, 1927, (2) that the decedent, in order to secure the money for such loan, had found it necessary to encumber her property, which was later transferred to the trust, and that such encumbrances exceeded its fair market value by the time payment was made in 1928; and (3) that the son paid his debt because of an oral understanding in 1928 with his mother that, if he would do so, she would have him made one of the trustees and would see that the corpus was not invaded again. In other words, counsel contend that this oral

[4] Taxpayers contend there was no legal obligation to pay but it is well settled that such debts are not extinguished. Thus the obligation remained but was unenforcible.

understanding between mother and son, four years after the creation of the trust, amounted to "a bona fide sale" and that the repayment by the son of the money which his mother had loaned him was in fact an outright purchase, with the required statutory consideration, of the entire remainder interests in the trust, which up to that time had been transferred by the mother, under the conditions set out in the trust deed, as a gift to the decedent's daughter and grandchildren, and to her son, in case he paid his debt.

Before answering this contention, we wish to call attention to the fact that this argument of the taxpayers, even if approved and adopted in its entirety, is in no respect an answer to the position taken by us in subdivision A, *supra.* Thus, the taxpayers' contention in no way affects what we have said there, and so, regardless of what view is held as to this phase of the case, the Tax Court's decision should still be affirmed on the basis of the Supreme Court cases cited above.

However, this does not mean that we consider the taxpayers' contention well founded in any respect. In the first place we submit that however the oral understanding between the decedent and her son should be described (and the facts concerning it are meager and are derived wholly from the son's testimony), it was not "a bona fide sale" within the meaning of Section 811 (c). It must be remembered that the creditor here was a mother who had made quite a sacrifice in order to make the loan to her son, and who was afraid that she had jeopardized her daughter's share in the property which would pass at the

mother's death. Thus, to protect her daughter's interests, the mother set up a trust transferring certain property, upon her death, as gifts to her daughter, and also to her son, if he had paid his debt by that time. But the mother, being in need of money for her own maintenance, had provided for trust income, above expenses, to be paid to her, and also authorized the trustees, of whom she was one, to invade the trust corpus whenever they thought it necessary for her support. It is hard to believe that the mother intended the oral understanding with her son to be treated as an absolute relinquishment of her rights to trust corpus, or "a bona fide sale" of the trust estate which she, while reserving certain interests to herself, had directed to be given to her children at her death. Nor can we believe that the son would have felt himself bound, after he became a trustee, to have prohibited any invasion of the trust corpus if his mother had needed it for her support.

Of course, the proper way to have secured a relinquishment of the mother's rights to trust corpus, if a relinquishment could have been obtained,[5] was to have had the mother do so in a written document signed

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[5] Obviously the oral understanding referred to cannot be treated as an amendment to the trust agreement since the decedent retained no power to alter or amend such agreement. (R. 93.) Thus, as the trustees were authorized to invade the corpus when necessary for the mother's support, the oral understanding cannot be interpreted as changing or limiting the powers expressly given to the trustees and the contention in regard to relinquishment does not extend to the provision allowing the estate to revert to the decedent under certain conditions. That provision would still stand even if right to invade for support was given up.

by her. But there is no such document, and in a letter written by the mother in 1928, at the time this oral understanding was reached, she did not intimate in any way that she had relinquished any rights but confined her remarks to the payments by her son on his debt. (R. 44.) We submit that in view of the nature of the evidence and its meagerness there was substantial basis for the Tax Court's finding that there was no relinquishment by the mother of her rights. (R. 100.) Consequently, as the question of relinquishment is one within the competence of the Tax Court and presents at least a question of mixed fact and law, if not one wholly of fact, the Tax Court's conclusion in regard to the relinquishment should be adopted here. *Dobson* v. *Commissioner,* 320 U. S. 489, rehearing denied, 321 U. S. 231.

We also submit that the payment of the debt here by the son was not the consideration required by Section 811 (c). Actually, such payment merely cancelled the debt which the son had long owed to his mother. Consequently it seems far-fetched to treat repayment of such a loan, which was admittedly owed, as consideration for the purchase of the valuable property rights under the trust which the son allegedly secured in 1928. But whether or not repayment of this loan might be treated as consideration under the laws of California, because its collection was barred by the local statute of limitations, it certainly does not follow that such repayment was "full and adequate consideration in money or money's worth" for federal tax purposes.

In contending that the required consideration was paid here, counsel for taxpayers have cited a number of California cases which show, for the most part, that in the circumstances there considered, oral agreements were given force and effect. However, even if the facts here were not somewhat different from those cases, we would still not be bound by them. As this Court pointed out in *Commissioner* v. *Greene,* 119 F. 2d 383, the rule is that state law may control federal tax cases only when the federal revenue statute, "by express language or necessary implication, makes its own operation dependent upon state law." (P. 385.) While that case involved gift tax, a question was also presented there as to what constituted consideration for federal tax purposes, and this Court held that it was not bound by state law as there was nothing in the gift tax provisions indicating that state law was to govern.

This Court also reached the same conclusion in *Giannini* v. *Commissioner,* 148 F. 2d 285, in construing Section 302 (c) of the Revenue Act of 1926, which corresponds to the provision in Section 811 (c), involved here. There this Court held that the transfer of property in trust by decedent in consideration that his parents also transfer property to the same trust was not full and adequate consideration in money or money's worth. This Court also stated that the existence of legal consideration according to local law is immaterial under the statutory provision involved there, and indicated that the federal courts had and should construe such provision strictly. Also see

Taft v. *Commissioner,* 304 U. S. 351, and *Commissioner* v. *Bristol,* 121 F. 2d 129 (C. C. A. 1st).

In view of these decisions and the clear language of Section 811 (c), we submit that the son did not give the consideration required in the exception. And, as we have pointed out above, the Tax Court found, and properly so, that the decedent did not relinquish her right to invade the corpus. Hence, decedent retained an interest in the trust corpus which was subject to invasion up to date of her death. Such transfers are specifically covered by Section 811 (c); and decedent merely agreed to do, and did, that which the federal statute subjects to estate tax.

CONCLUSION

The decision of the Tax Court is correct and should be affirmed.

Respectfully submitted.

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